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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. . . . . .

S. G. OLBERDING, doing business as VESS TRANSFER COMPANY and CHARLES DARNELL,

Petitioners,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Your petitioners, S. G. Olberding and Charles Darnell, hereinafter designated as Appellants, respectfully pray that a writ of certiorari issue to review and reverse the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled cause on the 12th day of February, 1953, and represent as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The action herein is one for personal judgment for property damage filed by Illinois Central Railroad Company, Inc. as plaintiff against S. G. Olberding, d/b/a Vess Transfer Company and Charles Darnell, defendants, in the United States District Court for the Western District of Kentucky, Paducah Division, on the 10th day of May, 1951. The Appellee, Illinois Central Railroad Company,

Inc., is a citizen of the State of Illinois and the complaint alleges is a "nonresident" of the State of Kentucky. The Appellants, S. G. Olberding and Charles Darnell, are and were at all times involved in the action, citizens of Indiana and residing at Evansville, Indiana. (R. 1-2 and R. 2-3, 45.)

2. The basis for jurisdiction in the United States District Court for the Western District of Kentucky, Paducah Division, is the diversity of citizenship of parties plaintiff and defendant and the controversy, exclusive of interest and costs, involving more than $3,000.00. (R. 1-2.)

3. The action arises from the alleged negligence of defendant Darnell in operating a motor vehicle of defendant Olberding on County Highway 305 in McCracken County, Kentucky, in such manner as to cause the same to run into and strike the bridge or overhead trestle of the plaintiff railroad company knocking the bridge and railroad tracks out of line and causing the derailment of a freight train operated by plaintiff railroad company consisting of a locomotive and 95 cars, to the damage of the plaintiff in the sum and amount of $150,000.00. Defendant Olberding is sued as the owner of the tractor and flat bed trailer upon which was loaded a dozer shovel and the defendant Darnell as the operator of said equipment when the accident occurred on the 26th day of April, 1951. Complaint was filed in the United States District Court for the Western District of Kentucky, Paducah Division, on May 10, 1951, and summons was issued for the defendants Olberding and Darnell, directed to the United States Marshal for the Eastern District of Kentucky and served on the Secretary of State at Frankfort, Kentucky, "pursuant to Chapter 188, Kentucky Revised Statutes, Sections .020 and .030." (R. 3.)

4. On May 29, 1951, under special and limited appearance the defendants Olberding and Darnell moved the Court for an order that the process and the service thereof be set aside and quashed and the action dismissed as to the individual defendants for the reason that each was a resident of the city of Evansville, State of Indiana, and at all times has been such resident and setting up that each of the defendants insists on his right to be sued in the district court of his residence and demands application of the laws of the United States in respect to venue in this proceeding and that the plaintiff is a nonresident of the State of Kentucky and is an inhabitant and resident of the State of Illinois and the Court is without jurisdiction to proceed in the action over the objection of these defendants because neither plaintiff nor defendant are citizens or residents of Kentucky or the Western District thereof. (R. 3-4.) Said motion was verified and discloses that the service of process upon the Secretary of State was beyond the Western District of Kentucky, Paducah Division, and without the purview of the Federal Statutes or the Federal Rules of Civil Procedure governing process. (R. 4-6.) Supporting affidavits disclose that neither of the individual defendants reside in the State of Kentucky or in the Western District thereof and they were served by registered mail only and the moving affiant Olberding prays the dismissal of the action as to himself and co-defendant and that the process and the service thereof be set aside and quashed. (R. 7-8.) On July 17, 1951, the plaintiff, Illinois Central Railroad Company, Inc., moved the Court for an order to dismiss the action as to the corporation defendant, the Brandeis Machinery and Supply Company, Inc., which motion the Court on said date sustained. (R. 9.) On the 15th day of August, 1951, the Court overruled the motion of the defendants Olberding and Darnell to set aside the

service of process and quash the writ and dismiss the action as to said defendants. (R. 10.) The action of the Court in overruling the motion is Point 1 of defendants' Statement of Points on which they relied for reversal in the United States Court of Appeals. (R. 56.)

5. On August 29, 1951, under their special and limited appearance herein, defendants filed their First Defense to the plaintiff's Complaint setting out that neither plaintiff nor the defendants-appellants are or were at any time citizens or residents of the State of Kentucky; that the action is founded on diversity of citizenship and may be brought only in the judicial district where all the defendants or all the plaintiffs are residents and claiming the privilege to be sued only in the United States District Court for the Southern District of Indiana, Evansville Division, and denying that they may be sued where found actually or constructively in the United States District Court for the Western District of Kentucky, Paducah Division, and refusing to waive their venue rights pray the Court for an order to dismiss the action as to each of them and quash the notice on the Secretary of State of the State of Kentucky as to these individual defendants-appellants and each of them. On September 15, 1951, the Court sustained the motion of the plaintiff-appellee to strike out the allegations of the First Defense on the grounds that the same were a reiteration of the defendants' motion to dismiss the action and quash the process and this ruling of the Court in striking out Paragraphs 2 to 11 from defendants' First Defense of the Answer is Point No. 3 of Defendants-Appellants' Statement of Points on which they rely for reversal in the United States Court of Appeals. (R. 56.)

6. On October 11, 1951, the defendant, Charles Darnell, moved the Court for an order to dismiss the action

herein because, among other grounds, that neither plaintiff nor defendants resided in the jurisdiction of the United States District Court for the Western District of Kentucky and setting up that Chapter 188, Kentucky Revised Statutes, entitled "Nonresident Motorist, Service of Process On," is a process and not a venue statute and neither purports to nor does affect the venue of the action and claiming the protection of the Federal venue statute and setting up that defendants in no manner can be deprived of their federal right to be sued in the district of their residence by a purely process statute of the State of Kentucky. On October 18, 1951, the Court overruled said motion of Charles Darnell (R. 16-19), and this action of the Court in overruling defendant Charles Darnell's motion to dismiss the action is Point No. 4 relied on for reversal in the United States Court of Appeals. (R. 56.)

7. Defendants-appellants filed their Second Defense alleging that the Complaint fails to state a claim against the defendants or either of them upon which relief can be granted (R. 13), and defendants' Third Defense is a denial of the allegations of the Complaint. (R. 13.) Defendants filed their Fourth Defense that the damage complained of in plaintiff's Complaint, if any, was owing to and resulted from the negligence of the plaintiff, Illinois Central Railroad Company, Inc., its agents and employees. (R. 15.)

8. Trial was by jury at the city of Paducah in the Western District of Kentucky on December 17, 18 and 19 and resulted in the verdict for damages in the sum of $37,500.00 and judgment followed for the plaintiff-appellee, Illinois Central Railroad Company, Inc., and against the defendants-appellants, S. G. Olberding and Charles Darnell in the said sum of $37,500.00. (R. 47.)

9. At the conclusion of the introduction of plaintiff's testimony the parties stipulated as evidence in the cause,

that the Illinois Central Railroad Company, Inc., plaintiff, is and was at the time of the filing of the action and at all times since, a citizen of the State of Illinois and the individual defendants, S. G. Olberding and Charles Darnell, were at the time of the filing of the action and at all times since and now are each citizens of the State of Indiana and residing in the city of Evansville, Indiana. (R. 45, 46.)

10. Excerpts of testimony are in the record. (R. 23-44.) Plaintiff introduced the deposition of the defendant Charles Darnell. (R. 23.) The witness has lived in Evansville, Indiana, since he was six years old and is now 54, is employed by the Vess Transfer Company owned by S. G. Olberding (R. 25) as a truck-driver; was in McCracken County, Kentucky, on April 26, 1951. He had a caterpillar tractor on his truck loaded at Louisville, Kentucky, the same day. (R. 25.) He was driving a Chevrolet trailer loaded at the Brandeis Machinery and Supply Company, Inc. (R. 28, 29.) The overpass was 11 feet, 4 inches and his load was about 1½ inches higher than that. The machine was a Bucyrus Dozer Shovel. (R. 32-33.)

The witness Loyce Thompson called by plaintiff, testified he heard the truck strike the trestle or overpass and saw the driver back out from the trestle. (R. 35.)

S. W. Peters, a witness called by the plaintiff, testified that he is employed by the Brandeis Machinery and Supply Company, Inc., as office engineer and negotiated the contract with Mr. Olberding to transfer the crawler tractor from Louisville to Paducah, consigned to the Smiley Sand and Gravel Company (R. 39-40) and the contract was for the entire job.

Mr. Allen Ball, called as witness for the plaintiff, testified that he lives in Paducah and was employed by Brandeis Machinery and Supply Company, Inc., as manager of the local branch at Paducah. (R. 41.) He directed

the shipment to be made to the Smiley job from Louisville and on April 26, 1951, he directed Mr. Darnell how to reach the job where Mr. Smiley was working at the plant and Mr. Darnell brought the equipment back to the Paducah yard of the Brandeis Machinery and Supply Company, Inc. and left it there. (R. 42-43.) The only break that he noticed on the equipment was the part that held the upright digging apparatus and this appeared to be minor at the time. (R. 44.)

The trial order of the Court is as follows:

"TRIAL ORDER—Entered December 19, 1951.

On December 17, 1951, came the parties by counsel and announced ready for trial. Plaintiff was represented by Messrs. Wheeler and Marshall, Paducah; defendants by Messrs. W. C. Welborn and W. L. Mitchell, Evansville, Indiana, and Joseph S. Freeland, Paducah. A jury was selected, impaneled, and sworn.

Mr. Marshall stated the case for the plaintiff, Mr. Mitchell for the defendants.

Plaintiff began presentation of its evidence and continued through the day. At five o'clock court adjourned to December 18th, at 9:30.

On December 18th, plaintiff's presentation of evidence was resumed and continued through the day.

On December 19th, trial was resumed. Plaintiff offered to file an amended complaint to conform to the proof, to which objection by defendants was made. Defendants' objection was overruled and the amended answer ordered filed. Same was controverted of record.

It was stipulated by counsel that plaintiff is a citizen of Illinois and defendants at the time of the accident sued on were and are now residents of Indiana, residing at Evansville, Indiana.

Defendants' evidence was then presented and was completed at 2:25 p.m. No rebuttal was presented,

and court recessed for conference on instructions until 3:20. Argument of counsel was made to the jury, the Court's instructions were given, and the jury retired at 4:50 p.m.

Objections made by the parties to the court's instructions, more particularly shown by the reporter's transcript of the evidence herein, were overruled by the Court.

At approximately 7:00 p.m. the jury returned to court and read and filed with the Clerk the following verdict:

'We, the jury, find for the Plaintiff damages in the sum of $37,500.00.' J. D. Rains, Foreman.

ROY M. SHELBOURNE,
Judge, U. S. District Court."

(R. 46-47.)

The judgment of the Court entered December 19, 1951, is as follows:

"JUDGMENT—Entered December 19, 1951.

The jury herein having returned a verdict for the plaintiff, Illinois Central Railroad Company, Inc., against the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell,

It Is Ordered, Adjudged, and Decreed that the plaintiff, Illinois Central Railroad Company, Inc., have and recover of the defendants S. G. Olberding doing business as Vess Transfer Company and Charles Darnell, the sum of Thirty-Seven Thousand Five Hundred ($37,500.00) Dollars with interest thereon at the rate of 6% per annum from date hereof until paid, and its costs herein, for all of which execution may issue.

ROY M. SHELBOURNE,
Judge, U. S. District Court."

(R. 47.)

The Notice of Appeal was filed and served on plaintiff-appellee January 16, 1952. (R. 48.)

Defendants-Appellants' Statement of Points Relied on for Reversal was filed with the Clerk January 25, 1952, and is as follows:

"DEFENDANTS-APPELLANTS' STATEMENT OF POINTS—Filed January 25, 1952.

To the Honorable William T. Beckham, Clerk of the United States District Court for the Western District of Kentucky:

The defendants, S. G. Olberding and Charles Darnell, and each of them now serve with their 'Designation of Contents of Record on Appeal' herein, the following concise statement of the points on which they and each of them intend to rely for a reversal thereof:

1. The court erred in overruling the Motion of the defendants, S. G. Olberding and Charles Darnell, to quash the process and dismiss the action with supporting affidavit.

2. The court erred in sustaining plaintiff's Motion to Dismiss the Action as to defendant Brandeis Machinery & Supply Co.

3. The court erred in sustaining plaintiff's Motion to Strike Paragraphs 2 to 11 from defendants' First Defense of the Answer herein.

4. The court erred in overruling defendant Charles Darnell's Motion to Dismiss the Action for Nonjoinder of Indispensable Party and for want of jurisdiction of the particular action herein.

5. The venue of the action was wrongfully laid as to the defendants, S. G. Olberding and Charles Darnell, because each is and was at the time of the filing of the action herein a citizen and resident of Indiana.

6. There is want of jurisdiction in the United States District Court for the Western District of Ken-

tucky because the action is solely for personal judgment and neither plaintiff nor defendant nor any of them are citizens of Kentucky or reside in the Western District of Kentucky.

W. L. Mitchell,
W. C. Weldorn,
Milford M. Miller,
Joseph S. Freeland."

(R. 56.)

II.

OPINIONS BELOW.

There was no written opinion of the District Court. Verdict of the jury and judgment of the Court are at pages 46 and 47 of the Record.

The opinion of the United States Court of Appeals for the Sixth Circuit is not quoted but is found in the Record at pages 60 to 62 thereof.

III.

BASIS OF THIS COURT'S JURISDICTION.

The judgment of the Court of Appeals was entered on February 12, 1953. (R. 59.) No Petition for Rehearing was filed.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

This petition is presented in a civil case by the defendants-appellants who were and are parties thereto.

IV.

STATUTES INVOLVED.

The pertinent statutory provisions of Title 28, United States Code, Section 1254 (1) are:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The venue rights claimed by the defendants-appellants arise under Title 28, U. S. C. A., Section 1391 (a):

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

Title 28, U. S. C. A., Section 1392 (a):

> "(a) Any civil action, not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts."

Title 28, U. S. C. A., Section 1393 (a):

> "(a) Except as otherwise provided, any civil action, not of a local nature, against a single defendant in a district containing more than one division must be brought in the division where he resides."

Section 74 of the Civil Code of Practice of Kentucky provides:

> "An action for an injury to the person or property of plaintiff must be brought in the county in which the defendant resides or in which the injury is done."

The provisions of the Kentucky Revised Statutes, Chapter 188 Sections .020 and .030 are invoked by plaintiff-appellee and are as follows:

"Nonresident Owner or Operator of Motor Vehicle Makes Secretary of State Process Agent.—Any nonresident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to nonresidents to operate motor vehicles or have them operated within this state shall, by such acceptance and by the operation of such motor vehicle within this state, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this state against the operator or owner arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved.

Service of Summons and Petition in Action Against Nonresident Motorist.—The clerk of the court in which the action is brought shall issue it to the sheriff of Franklin County. The sheriff shall execute the summons by delivering a true copy to the Secretary of State at least twenty days before the return day of the summons, and shall also deliver with the summons an attested copy of plaintiff's petition. The Secretary of State shall then write a letter to the defendant, at the address given in the petition, notifying him of the nature and pendency of the action, and enclosing in the letter the summons and the copy of the petition. The letter shall be posted by prepaid registered mail and shall bear the return address of the Secretary. The Secretary shall file a report of his action, which shall include a copy of the letter, any answer thereto, and the return registry receipt, with the clerk who issued the summons."

V.

QUESTIONS PRESENTED.

Question 1.

Does the Kentucky Nonresident Motorist Act, Kentucky Revised Statutes, Chapter 188.010-.060, construed by the Court of Last Resort of Kentucky to be a purely process statute and held not to affect the venue of civil actions in the Kentucky Courts, affect the venue of like actions in the United States District Courts?

Question 2.

Will the Kentucky Nonresident Motorist Act, which leaves the defendant free to object to the venue of any state court excepting only the one forum where the injury is done be construed to deny the defendant the right to assert his venue privileges under the Judicial Code of the United States, Title 28, Section 1391(a), in the United States District Court?

Question 3.

Will the nonresident motorist be denied his venue rights in the United States District Court under the Nonresident Motorist Act when the law of the state preserves his venue rights in the courts of the state under the same act?

Question 4.

May a defendant in this action for personal judgment be brought into court by constructive service of process when personal service, though had, would be unavailing?

Question 5.

Does the United States District Court obtain jurisdiction over the persons of the defendants by service of process upon the Secretary of State when personal service upon the defendants in or out of the district would be ineffective over defendants' objection?

VI.

REASONS RELIED ON FOR THE WRIT.

1. The decision of the United States Court of Appeals for the Sixth Circuit is in conflict with the decision of the United States Court of Appeals for the First Circuit in the case of *Martin vs. Fischback Trucking Co.*, 183 F. (2d) 53 (CA 1) in holding that the enforced designation of the Secretary of State as process agent in any civil action instituted in the courts of the state enables the United States District Court for the Western District of Kentucky to issue process to the Secretary of State in the Eastern District of Kentucky effective to acquire jurisdiction over the person of the defendants and of the particular action and is and constitutes a waiver of the venue privilege of the individual defendants as provided by the Judicial Code of the United States, Title 28, Section 1391(a), 1392(a) and 1393(a).

2. The decision of the United States Court of Appeals for the Sixth Circuit as to the effect of the Kentucky Nonresident Motorist Act, Kentucky Revised Statutes, 188.020 and 188.030 on venue of the action arising thereunder in holding that appointing the Secretary of State their process agent waives the right of the individual defendants to object to venue is a decision on an important question of local law in a way in conflict with applicable local decisions on the same subject as follows:

Kennedy vs. Lee (1938), 272 Ky. 237, 13 S. W. (2d) 1125. *Fisher Packing Co. vs. Mattox* (1936), 262 Ky. 318, 90 S. W. (2d) 17, holding that the Kentucky Act is a purely process statute and does not affect venue.

3. The decision of the United States Court of Appeals for the Sixth Circuit involves an important question of federal law which is not decided but should be settled by the Supreme Court of the United States:—Does a natural person by operating a motor vehicle within the state and thereby consenting to service of process upon the Secretary of State in the event of damage resulting from such operation waive his right to be sued only in the United States District Court of the District of his physical habitation?

4. The decision of the United States Court of Appeals for the Sixth Circuit involves an important question of Federal law which is not decided but should be settled by the Supreme Court of the United States as follows:—Does the involuntary appointment of the Secretary of State as process agent in a civil action for damages under the Non-resident Motorist Act have the same effect as a waiver of venue in the United States District Court in the case of a corporation defendant carrying on its business within a state, complying with the state law by naming a process agent and becoming a resident of the state under the provisions of the Judicial Code, Title 28, Section 1391 (c)?

5. The decision of the United States Court of Appeals for the Sixth Circuit involves an important question of federal law which is not decided but should be settled by the Supreme Court of the United States as follows:—Is constructive service of process issued by the Clerk of the United States District Court for the Western District of Kentucky to the United States Marshal for the Eastern

District of Kentucky to be served upon the Secretary of State in the Eastern District of Kentucky effective to acquire jurisdiction over the persons of the individual defendants residing in the Southern District of Indiana and of the particular action against the defendants when personal service of process upon the individual defendants would not be effective to implement the jurisdiction of the district court.

6. The decision of the United States Court of Appeals for the Sixth Circuit in holding constructive service of process upon the Secretary of State is valid over the objections of the individual defendants when personal service of process issued by the same United States District Court would be set aside upon motion of the defendant, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

7. The decision of the United States Court of Appeals for the Sixth Circuit that the United States District Court for the Western District of Kentucky obtained jurisdiction over the persons of the individual defendants by service of process upon the Secretary of State when personal service of process issued by the United States District Court for the Western District of Kentucky and served upon defendants in or out of the district would be ineffective over defendants' objection so far sanctions such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the Seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court a full

and complete transcript of the record and of the proceedings of the said United States Court of Appeals had in the case numbered and entitled on its docket, No. 11,587, S. G. Olberding, d/b/a Veas Transfer Co. and Charles Darnell, Plaintiffs-Appellants vs. Illinois Central Railroad Company, Inc., Defendant-Appellee, all to the end that this cause may be reviewed and determined by the Court as provided for by the Statutes of the United States; and that the judgment herein of said United States Court of Appeals for the Sixth Circuit be reversed by the Court and for such further relief as to this Court may seem proper.

Dated March 28, 1953.

S. G. OLBERDING,
CHARLES DARNELL,
Petitioners,

By W. C. WELBORN,
MILFORD M. MILLER,
Counsel for Petitioners.

W. L. MITCHELL,
Of Counsel.